

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

BEST YET MARKET, INC.

and

Case 29-CA-242451

UNITED FOOD AND COMMERCIAL WORKERS
INTERNATIONAL UNION

**BEST YET MARKET, INC.’S REPLY TO THE GENERAL COUNSEL’S OPPOSITION
TO RESPONDENT’S MOTION FOR SUMMARY JUDGMENT**

Respondent, Best Yet Market (“Respondent”), by and through the undersigned counsel, hereby files its Reply to the General Counsel’s Opposition to Respondent’s Motion for Summary Judgment (“Opposition”). The General Counsel’s Opposition cites one completely inapposite Board case to support its position that one employee acting alone can engage in protected concerted activity by making an after-the-fact complaint about a co-worker’s termination. There is no Board case that supports the General Counsel’s Opposition as a matter of law and the General Counsel is unable to show the existence of a genuine issue of material fact precluding summary judgment.

I. PADRO’S SOLO AFTER-THE-FACT COMPLAINT WAS NOT PROTECTED AND CONCERTED ACTIVITY AND THEREFORE NO GENUINE ISSUE OF MATERIAL FACT EXISTS.

The General Counsel takes a distorted view of the pertinent *facts* of this case. The General Counsel’s sole argument is that the Motion should not be granted because Respondent denies that Padro’s protest was “concerted in nature or that the protected activity was the reason Respondent transferred him.” (*See* Opposition, p. 2). The General Counsel, however, frames a legal – not a *factual* – dispute. Simply put, a factual dispute cannot be manufactured under the guise of a legal

conclusion. Indeed, the General Counsel does not oppose a single *fact* included in Respondent's Motion:

1. Padro entered Franklin Square – when he was off-duty – to confront Deli Team Leader Michelle Straub (“Straub”) about the termination of his co-worker, Alexis Ares (“Ares”). (Motion, p. 2);
2. Padro approached Straub in the deli department to complain about the termination of Ares, shouting: “you should have stood up for her!” (*Id.* at p. 3);
3. After a few minutes of this confrontation, Padro left the deli department and walked out of the store. (*Id.*);
4. Straub did not terminate Ares, nor was she involved in the decision to do so. (*Id.*); and
5. Ares was terminated for stealing food from the deli counter – an infraction that leads to automatic termination under Respondent's workplace policy. (*Id.*)

It is undisputed that Padro entered and left the store alone. There is no evidence presented in the Opposition that Padro was engaged in group action, or was attempting to solicit employees to engage in group action. Padro was griping about the termination of a co-worker, nothing more. This is the rare case where no genuine issue of material fact exists and Respondent is entitled to judgment as a matter of law.

II. THE GENERAL COUNSEL MISINTERPRETS BOARD LAW.

The General Counsel relies on a single inapposite Board decision to support its position that Padro's conduct was protected and concerted. *See Silver State Disposal Service, Inc.* (“*Silver State*”), 326 NLRB 84 (1998). *Silver State*, however, is easily distinguishable from the facts at issue here. In *Silver State*, the Board determined Respondent violated Sections 8(a)(1) and (3) of the Act after Respondent terminated 71 unit-employees for engaging in a work stoppage. (*Id.* at 85). The work stoppage was, in part, initiated to support a grievance filed by a fellow employee, Albert Crockett (“Crockett”), who had recently been terminated for a workplace policy violation.

(*Id.*) The termination, in particular, struck the ire of the unit-employees because Crockett was the president of a committee the employees had recently established to address their dissatisfaction with the terms and conditions of their employment. (*Id.*) To wit, *Crockett had a direct impact on the unit-employees' job interests* via his position as committee president. Notably, the Board in *Silver State* did not address whether protesting the discharge of a co-worker – one with no direct impact on workplace conditions – is protected and concerted under the Act. The issue in *Silver State* was whether the unit-employees' work stoppage violated a no-strike clause included in the employer's collective bargaining agreement with the union. (*Id.* at 86). No such issue is presented here. Indeed, Padro did not engage in a strike or work stoppage of any kind. He conveyed his frustrations to a non-involved supervisor about the termination of a co-worker, nothing more. Padro acted independently and without provocation. His conduct was nothing more than a personal gripe, of which the Board has continuously found not to be protected or concerted under the Act. *See Alstate Maintenance, LLC*, 367 NLRB No. 68 (2019).

III. CONCLUSION

Based on the foregoing, Respondent respectfully requests the Board grant its Motion for Summary Judgment in full.

Respectfully submitted this 24th day of October, 2019.



Thomas J. Birchfield
Paul E. Goatley
FISHER & PHILLIPS LLP
220 West Main Street, Suite 1700
Louisville, Kentucky 40202
Phone: (502) 561-3986
Fax: (502) 561-3991
E-mail: tbirchfield@fisherphillips.com
E-mail: pgoatley@fisherphillips.com

COUNSEL FOR BEST YET MARKET, INC.

AFFIDAVIT OF SERVICE

It is hereby certified that the within document was filed electronically via the Agency's website, www.nlr.gov, on this the 24th day of October, 2019, effectuating service on the NLRB's Office of General Counsel. On this same date, paper copies of the within document were served via first class mail and electronic mail upon the following:

George Wiszynski, Esq.
Associate General Counsel
United Food and Commercial Workers
International Union
1775 K Street NW
Washington, DC 20006-1502
E-mail: gwiszynski@ufcw.org

Amanda Jaret, Esq.
Assistant General Counsel, Legal Dep't
United Food and Commercial Workers
International Union, AFL-CIO, CLC
1775 K St. NW
Washington, DC 20006-1598
E-mail: ajaret@ufcw.org

Brent E. Childerhose, Esq.
National Labor Relations Board
Region 29
Two Metro Tech Center, Suite 5100
Brooklyn, NY 11201
E-mail: Brent.Childerhose@nlrb.gov



COUNSEL FOR BEST YET MARKET, INC.